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progressive inheritance taxes have been held void.¹² Undoubtedly peculiarities of the State constitutions have been responsible for some of these decisions, but this result has in general been reached on the ground that a right of inheritance is property, and as such protected from a progressive tax.¹³

Manifestly the tax involved in the principal case, being authorized by the State constitution, can be attacked, if at all, only through the Fourteenth Amendment, and the decisions to the effect that this Amendment in no wise imposes an unbending rule of equal taxation upon the States¹⁴ are not of much assistance in determining the validity of a progressive tax. It is apparent, then, that the constitutionality of progressive income taxation has never been passed upon with reference to the Fifth or Fourteenth Amendments; that such a rate has been judicially sanctioned only when applied to an inheritance tax; and that an *obiter dictum*, unsupported by authority, is the only Supreme Court utterance on the question of applying such a rate to a tax on property. It is true that exemptions do effect a kind of restricted progression, but the cases construing taxes with such provisions afford little help, as exemptions must for various reasons be deemed *sui generis*.¹⁵ We are thus thrown upon the troubled sea of conflicting economic theories, and when the question is squarely presented to the Supreme Court the elasticity of the "due process" and "equal protection" clauses will entail a decision chiefly determined by the majority view of political economy.¹⁶ It is submitted that this is the true status of the question at present, and that a consideration of the difference in the subject-matter of taxes upon succession and upon income demonstrates the error of the wide-spread assumption that the inheritance tax cases are so analogous as to be controlling.¹⁷

NATURE AND VALIDITY OF LICENSE RESTRICTIONS IMPOSED BY A PATENTEE.—The right conferred upon an inventor by the patent law is the purely negative one to exclude others from the fruits of his discovery¹ and, as creature of Federal law, this monopoly is beyond State control.² The positive rights of enjoyment possessed by a patentee in his invention are those common to all owners of property and, having

¹²Gray, Limitations of Taxing Power, §§ 1482-1489.

¹³*Ibid.* Even though the premise be false, it would seem that the reasoning is nevertheless entitled to consideration.

¹⁴*Bell's Gap R. R. Co. v. Pa.* (1890) 134 U. S. 232, 237.

¹⁵Gray, *op. cit.*, §§ 1478, 1479. Clearly, practical considerations demand this result. Two reasons may perhaps suffice: the ruinous expenditure necessarily incurred in collecting the smallest taxes; and the fact that if the Government does not exempt the theoretical minimum of subsistence it must make reparation through the medium of its poor laws.

¹⁶It seems inevitable that a consideration of the reasonableness of the classification will have great weight. See Knowlton *v.* Moore *supra*, 109.

¹⁷It seems safe to declare that there is scarcely a writer on political economy who does not take for granted that progressive taxation is open to no constitutional objection. See, for instance, Seligman, *The Income Tax*, 532, 533; Ch. VI. § 5.

¹U. S. Comp. Stat. (1901) § 4884. See *Bloomer v. McQuewan* (1852) 14 How. 539, 549.

²*Ex parte Robinson* (1870) 4 Fisher 186; *cf.* Opinion of Justices (1907) 193 Mass. 605.

their source in the general law, must be exercised in subservience thereto. It is therefore apparent that although a given commodity is patented, the State is not thereby precluded from interdicting or regulating its manufacture, sale or use even by the patentee himself, as the policy of the State may demand.³ But because there reside in every inventor these two classes of rights, flowing from and governed by different laws, each the expression of a different wisdom, it frequently becomes indispensable to a proper disposition of litigation arising from the transactions of a patentee, to determine the source of the right involved. This question is frequently presented in the form of a jurisdictional problem. If the right invaded is derived from the general law, the State courts alone have power to enforce, rescind or protect an inventor's contracts even though their subject-matter is a patented article.⁴ The national tribunals, on the other hand, are alone competent to relieve against a violation of monopoly rights.⁵ The problem is illustrated by the recent case of *Henry et al. v. A. B. Dick Co.* (1912) 32 Sup. Ct. Rep. 364, in which the jurisdiction of the Federal courts depended upon the presence of a Federal question. A patented mimeograph was sold with the license restriction that it was to be used only with materials furnished by the patentee. The defendant, knowing this fact, supplied the vendee with ink to be employed in operating the machine, and was charged with contributory infringement.⁶ It is clear that this question must be answered in favor of Federal jurisdiction, as it was, by a divided court, if any right secured to the plaintiff by the patent law was violated.

While the patentee's exclusive rights of manufacture, sale and use are inseparable for purposes of assignment,⁷ these modes of enjoyment may be licensed separately. Such a license merely assures to the licensee an immunity from suit for acts which would otherwise constitute an invasion of the patentee's monopoly. If the license is contained in an agreement, an excessive user is not only a breach of contract, remediable under the general law, but also an infringement, actionable under the patent law.⁸ If, on the contrary, a patented machine is sold without the reservation of any monopoly right therein, it is removed from the domain of the patent law, and a breach of a contract stipulation concerning it cannot operate as an infringement.⁹ But this principle is applicable to the case under consideration only if, by permitting the mimeograph to be used at all, the patentee parted with all monopoly right therein. That he did so was the conclusion reached by the dissenting judges¹⁰ apparently upon the theory, suggested

³Patterson v. Kentucky (1878) 97 U. S. 501.

⁴Wilson v. Sandford (1850) 10 How. 99; Albright v. Teas (1882) 106 U. S. 613.

⁵U. S. Comp. Stat. (1901) §§ 629, 711, 4919, 4921.

⁶Contributory infringement is the intentional aiding of one person by another in the unlawful making, selling or using of a patented invention. See notes to Edison etc. Co. v. Peninsular etc. Co. (1900) 43 C. C. A. 479, and Aeolian Co. v. Juelg (1907) 86 C. C. A. 205.

⁷Gayler v. Wilder (1850) 10 How. 477; Waterman v. Mackenzie (1891) 138 U. S. 252. The patentee's monopoly right may be divided territorially, however. Littlefield v. Perry (1874) 21 Wall. 205.

⁸St. Louis etc. Co. v. Sanitary etc. Co. (1910) 178 Fed. 923.

⁹Mitchell v. Hawley (1872) 16 Wall. 544; Keeler v. Folding Bed Co. (1894) 157 U. S. 659.

¹⁰Mr. Chief Justice White, Mr. Justice Hughes, and Mr. Justice Lamar.

in other decisions,¹¹ that letters patent cover only an idea, or the method embraced thereby, apart from its material expression, and that to permit the use of a patented contrivance designed to execute this process, is, with respect to that element of the monopoly, to part with all rights given by the patent law. Thus, since the employment of a given ink was not an integral part of the patented method, the particular restriction placed upon the operations of the mimeograph was not a reservation of any right of monopoly, and its violation was therefore not an infringement. The majority of the court, however, denied that the mental concept may be thus dissociated from its tangible embodiment, and reasoned that as the right of enjoyment given by the general law is limited to no definite modes of enjoyment, so the right of exclusion granted by the patent law extends to every kind of user for the purposes designed to be accomplished by the patented machine. Consequently, to operate it in a way other than that specified by the patentee is to invade his monopoly.¹² While the extent of a patentee's monopoly right is, of course, a matter of statutory construction, it would seem that the policy of the patent law is fully observed by the conception of this right entertained by the minority of the court.

This question is important not only from the standpoint of jurisdiction, but also from that of the validity of a patentee's contracts. Just as the rights of enjoyment which an inventor has in his discovery are measured by the general law, so the validity of his agreements which relate solely to those rights are to be tested by that law.¹³ The patent statutes, in so far as they foster monopoly, are hostile not only to the policy of that law, to which they are superior, but to that of the Sherman Law, which is not considered to have impaired them.¹⁴ But since contracts which seek only to effectuate an inventor's monopoly are to be governed by the patent law,¹⁵ it is manifest that the broader the scope of these rights, the greater is the power of a patentee to contract in defiance of anti-trust legislation. This must follow since, whenever a contract may be considered a "license restriction", doing nothing more than to delimit the field of immunity accorded the licensee, any resulting restraint on trade is to be attributed primarily to the patent and not to the contract, and the Sherman Act will not be applicable.¹⁶ The patent law will nevertheless afford the patentee no protection, however extensive his monopoly rights, if by contract he attempts to extend their scope.¹⁷

¹¹See *Patterson v. Kentucky* *supra*, p. 506; *Rubber etc. Co. v. Milwaukee Rubber Co.* (1907) 154 Fed. 358, 362.

¹²*Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* (1896) 77 Fed. 288; *Rupp etc. Co. v. Elliott* (1904) 131 Fed. 730; *New Jersey Patent Co. v. Schaeffer* (1908) 159 Fed. 171; *Crown Cork etc. Co. v. Brooklyn Stopper Co.* (1909) 172 Fed. 225; *Crown Cork etc. Co. v. Standard Brewery* (1909) 174 Fed. 252.

¹³*People v. Hudson River Tel. Co.* (N. Y. 1887) 19 Abb. N. C. 466; *Chesapeake etc. Tel. Co. v. Baltimore etc. Tel. Co.* (1886) 66 Md. 399.

¹⁴*Bement v. National Harrow Co.* (1902) 186 U. S. 90; *Rubber Co. v. Milwaukee Rubber Co.* *supra*.

¹⁵For a discussion of the relation between the Sherman Act and the patent law, see 9 COLUMBIA LAW REVIEW 536.

¹⁶See cases cited in foot-note 12, *supra*.

¹⁷This is illustrated by the recent case of *U. S. v. Sanitary Mfg. Co.* (1911) 191 Fed. 172. In this case a control over products made by a patented tool was sought by means of license restrictions on the use of the tool, but their validity was denied. See also 9 COLUMBIA LAW REVIEW 536.